Md Yunus bin Ali v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL: 42-03 OF 2007-III (I)
DAVID WONG JC
9 APRIL 2007

Criminal Procedure — Charge — Conviction — Whether there was non-compliance with s 173 Criminal Procedure Code

Criminal Law — Sentence — Interference by an appellate court — Circumstances in which court may do so

The accused filed an appeal against the decision of the Sessions Court Judge who had on 22 December 2006 convicted him on his own plea of guilt of four charges, two of which were for contravention of the Immigration Regulation 1963 and the other two for contravention of s 12A of the Passport Act 1966. Counsel for the accused submitted that there was non-compliance with s 173(b) of the Criminal Procedure Code by the Sessions Court Judge and the Court had the right to set aside the conviction.

Held, dismissing the accused's appeal with costs:

(1) The only complaint by the accused was that the name of the interpreter does not appear in the notes of proceedings. From the notes of proceedings, it was crystal clear that the accused was informed of all the relevant information for him to make an informed decision to plead guilty. To say otherwise is similar to calling something black when it is white (see para 12).

(2) As for sentence, the Appellate Court will only interfere if it is shown that the lower court had acted on wrong principles in coming to its decision i.e by taking into consideration irrelevant matters or the sentence is manifestly excessive or illegal. Further it is an established practice that the Appellate Court will not alter a sentence merely because it might pass a different sentence (see para 13).

[Bahasa Malaysia summary

Tertuduh memfailkan rayuan terhadap keputusan Hakim Mahkamah Sesyen yang pada 22 Disember 2006 mensabitkannya atau pengakuan bersalahnya untuk empat pertuduhan, dua daripadanya adalah untuk pelanggaran Peraturan Imigresen 1963 dan dua daripadanya untuk pelanggaran s 12A Akta Pasport 1966. Peguamcara untuk tertuduh menghujahkan bahawa tiada pematuhan dengan s 173(b) Kanun

A Tatacara Jenayah oleh Hakim Mahkamah Sesyen dan mahkamah mempunyai hak untuk mengenepikan sabitan.

Diputuskan, menolak rayuan tertuduh dengan kos:

B

(1) Satu-satunya aduan oleh tertuduh adalah nama jurubahasa tidak tertera dalam nota-nota prosiding. Daripada nota-nota prosiding, ia adalah amat jelas bahawa tertuduh telah dimaklumkan berkenaan semua maklumat relevan untuknya membuat keputusan mengaku salah setelah mengetahui kesemua maklumat. Untuk mengatakan sebaliknya adalah sama sepermti memanggil

C sesuatu adalah hitam sedangkan ia sebenarnya berwarna putih (lihat perenggan 12).

(2) Bagi hukuman pula, Mahkamah rayuan akan hanya mencampuri jika ia mendapati bahawa mahkamah rendah telah bertindak atas prinsip yang salah semasa membuat keputusan seperti mengambil pertimbangan perkara-perkara

D yang tidak relevan atau hukuman adalah jelas keterlaluan atau menyalahi undang-undang. Selanjutnya ia adalah amalan yang biasa bahawa Mahkamah Rayuan tidak akan mengubah sesuatu hukuman keranan ia mungkin akan memberikan hukuman yang berlainan (lihat perenggan 13).]

E **Notes**

For the case on conviction of criminal procedure, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1009.

Cases referred to

F *Chua Ah Gan v PP* [1958] MLJ liv (refd)
Koh Mui Keow v Regina [1952] 18 MLJ 214 (refd)
Meissner v The Queen [1994] 184 CLR 132 (refd)
New Tuck Shen v Public Prosecutor [1982] 1 MLJ 27 (refd)
PP v Benzi Anak Nayod (M) & 2 Ors [2006] 7 MLJ 448 (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)

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Legislation referred to

Criminal Procedure Code s 173(b)
Passport Act 1966 s 12A

John Shek (M/s John Shek, Sigar, Wei Yee) for the appellant.

H *Fazillah Begum Bt Abdul Ghani (Attorney General's Office, Kuching, Sarawak) for the respondent.*

David Wong JC:

I

[1] This is an appeal by the appellant-accused ('the accused') against the decision of the learned Sessions Court Judge (SCJ) who had on 22nd December 2006 convicted him on his own plea of guilt of four charges, two of which were for contravention of the Immigration Regulation 1963 and the other two for contravention of s 12A of the Passport Act 1966.

[2] Charges and sentences:

> That you on 15 October 2006 at about 1600 in front of Bumiputra-Commerce Bank Berhad, Jalan Rock, 93800 Kuching, Sarawak, holder of Student Pass No: VA39070905 on page 14 of your Bangladeshi Passport No:W0957804, was found working and was given RM1900.00 by Taizel Elahi Mondal for him to obtain a passport and air ticket to leave Kuching, Sarawak, in contravention with Regulation 13(3), an offence under Regulation 39(b) of the Immigration Regulation 1963 and punishable under the same regulation

[3] For this charge the accused was sentenced to three months imprisonment with effect from date of arrest.

> That you on 15 October 2006 at about 1600 in front of Bumiputra-Commerce Bank Berhad, Jalan Rock, 93800 Kuching, Sarawak, holder of Student Pass No: VA3907090 on p 14 of your Bangladeshi Passport No:W0957804, was found working and was given RM1900.00 by Jamal Chan Miah for him to obtain a passport and air ticket to [CRA 42-03-2007-III (I) leave Kuching, Sarawak, in contravention with Regulation 13(3), an offence under Regulation 39(b) of the Immigration Regulation 1963 and punishable under the same regulation.

[4] For this charge the accused was sentenced to three months imprisonment with effect from date of arrest and to run concurrently with the first sentence.

> That you on 15 October 2006 at about 1600 in front of Bumiputra-Commerce Bank Berhad, Jalan Rock, 93800 Kuching, Sarawak, holder of Student Pass No: VA3907090 on p 14 of your Bangladeshi Passport No:W0957804, with intent had obtained a Bangladeshi passport V0686896 belonging to Barek Hazrat Ali to your knowledge is false for the use of Taizel Elahi Mondal that the photograph was altered in contravention with s 12A Passport Act 1966 and punishable under s 12A of the said Act.

[5] For this charge, the accused was fined RM30,000.00 fine in default of eight months imprisonment and sentenced to a further imprisonment term of two years to run consecutive to the first three concurrent sentence and to take effect after the expiry of the said sentence.

> That you on 15 October 2006 at about 1600 in front of 5 Bumiputra-Commerce Bank Berhad, Jalan Rock, 93800 Kuching, Sarawak, holder of Student Pass No: VA3907090 on p 14 of your Bangladeshi Passport No:W0957804, with intent had obtained a Bangladeshi passport V685692 belonging to Md Jamal Md Jane to your knowledge is false 10 for the use of Jamal Chan Miah that the photograph was altered in contravention with s 12A Passport Act 1966 and punishable under s 12A of the said Act.

[6] For this charge the accused was fined RM30,000.00 in default 8 months imprisonment and sentenced to a further imprisonment term of two years to run concurrently with the sentence in the third charge.

[7] I dismissed this appeal on 26 February 2007 and since the accused has appealed against my decision, I now give my grounds of decision.

Contentions of counsels

[8] Mr. John Shek, counsel for the accused in his submission gave three grounds of complaint which in my view concerned only the alleged non compliance by the SCJ

to s 173(b) of the Criminal Procedure Code(CPC) which reads as follow: If the accused pleads guilty to the charge, whether as original framed or as amended, the plea shall be recorded and he may be framed thereon and the court shall pass sentence according to law:

> Provided that before a plea of guilt is recorded the court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him

[9] Mr Shek started his submission with the concession that the accused had no right of appeal against his conviction as he was convicted on his own plea. However, he submitted that since there was non compliance of s 173(b) CPC by the SCJ, the court had the right to set aside the conviction and relied on the case of *Koh Mui Keow v Regina* [1952] 18 MLJ 214. I have no problem with that submission, in fact I had in*PP v Benzi Anak Nayod (M) & 2 Ors* [2006] 7 MLJ 448 said 'When a person does not have legal representations in court, the presiding officer must take pains to ensure that the person is fully aware of his rights and is further entitled to know the facts and nature of the charge and most importantly the consequence of pleading guilty. One can say that it is his constitutional right. The reason is simple as the plea of guilt itself is a cogent admission of the ingredients of the charge and that person can only make an informed decision as to how to plead only if he had all the relevant information. In *Meissner v The Queen* [1994] 184 CLR 132 at p 141, Brennan, Toohey and McHugh JJ said:

> A court will act on a plea of guilt when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence.

[10] Closer to home, we have the case of *Chua Ah Gan v PP* [1958] MLJ liv, where the appellant was convicted on his plea of guilty. On appeal he argued that the charge was not explained to him properly and as such he did not understand it. Hepworth J found that although it was recorded that the charge had been read and explained, it was not recorded that he understood it. The learned Judge stressed that as a matter of practice whether an accused person pleads guilty or not it should always be clear in the record that the charge had been 'read, explained and understood' and that if the plea is one of guilty it should also be made clear in the record that the accused understands the nature and consequences of the plea.

[11] I come now to determine whether there was in fact non compliance of s 173(b) CPC. For this purpose I reproduce the relevant part of the notes of proceedings (NOP):

22nd December, 2006
For P.P.: SFC Fazillah Begum

Accused:	Present. I understand English. I agree to have the charge read and explained to me in English.
Accused:	I understand the charge and plead guilty
	I admit that I was working.
	I was given RM1900 by Taizel Elahi Mondal to obtain a passport and air ticket for him to leave Kuching.
	I understand the second charge and plead guilty. I admit that I was working and was given RM2000 by Jamal Chan Miah to obtain a passport and air ticket for him to leave Kuching.
	I understand the third charge (as amended) and plead guilty.
	I admit that I had obtained a false passport for Taizel Elahi Mondal in the name of Barek Hazrat Ali.
	I understand the fourth charge (as amended) and plead guilty.
	I admit that I had obtained a false passport in the name of Md. Jamal Md. Jane for Jamal Chan Miah.
	I confirm that all 4 offences were committed in front of Bumiputra-Commerce, Jalan Rock, Kuching.
	I confirm that the 4 offences were committed at 4 p.m. on 15 October 2006.
	I still maintain my plea of guilty to the charges.
	I understand that with my plea of guilty there will not be any trial and I will be sentenced by the court if the court accepts my plea of guilty to all 4 charges.
	I still maintain my plea of guilty to all the charges.
SFC:	Tender brief facts (as amended).
Accused:	I understand and admit the brief facts as correct.
Court:	ExP1.
Accused:	I understand and admit the brief fact (as amended) to be correct.

[12] The only complaint by Mr Shek was that the name of the interpreter does not appear in the NOP. However he could not produce to me any case authority to support his submission. With respect, it is my view that as long as the guidelines stated in *PP v Benzi Anak Nayod (M) & 2 Ors* were followed, the SCJ would have complied with her judicial duty. From the NOP, it was crystal clear to me that the accused was informed of all the relevant information for him to make an informed decision to plead guilty. To say otherwise is similar to calling something black when it is white.

[13] As for the sentence, there was no submission by Mr Shek. Be that as it may, for completeness I will deal with it. I am of course guided by the general principle that the Appellate Court will only interfere if it is shown that the lower court had acted on wrong principles in coming to its decision i.e. by taking into consideration irrelevant matters or the sentence is manifestly excessive or illegal. Further, it is an established practice that the Appellate Court will not alter a sentence merely because it might pass a different sentence (see *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256; *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27).

[14] Can I say here that the SCJ had acted on wrong principles?

[15] Her grounds of sentencing are set out in pp 5 to 8 of the record of appeal and having read and re read them I cannot fault her. She has taken into account the relevant considerations ie the public interest, the image of the country as an education centre, deterrence, the plea of guilty by the accused, and the fact the accused was a first offender.

[16] For all the reasons stated above, I dismissed the appeal.

Appeal dismissed.

Reported by Brendan Navin Siva